

Respondent argues the Board does not have proper jurisdiction to consider this appeal. Respondent argues the ALJ's Order denies the motion to compel because

respondent cannot be compelled to produce documents it does not possess. Respondent argues claimant seeks to avoid responsibility for an imprudently filed motion and the relief for respondent in K.S.A. 60-237(A)(5)(B) requiring fees paid by the movant. If the Board takes jurisdiction, respondent requests the Board affirm the ALJ's Order.

The issue is: does the Board have jurisdiction to review the ALJ's order denying claimant's motion to compel discovery and taxing the costs of the proceeding to claimant?

FINDINGS OF FACT

On September 14, 2015, claimant filed a Request for Production of Documents, requesting documents supporting respondent's contention claimant's death was contributed to by substances mentioned in K.S.A. 44-501(b)(2), the admissibility of chemical testing and the chain of custody. On October 21, 2015, claimant's counsel emailed a letter to respondent's counsel asking for a response to the Request for Production of Documents, but received no response. On November 3, 2015, claimant filed a Motion to Compel Production stating respondent did not answer claimant's requests and if respondent opposed the motion and lost, respondent should pay attorney fees and expenses for the filing of the motion. On December 4, 2015, respondent filed its objection and response to claimant's requests.

At the hearing on December 22, 2015, claimant requested respondent produce its insurance adjustor's file. Respondent indicated it would provide said file, except privileged documents, as soon as it was received from the insurance carrier. Respondent also noted, the insurance adjustor's file was not one of the documents listed in claimant's Request for Production of Documents. Respondent indicated it would voluntarily provide all documents requested that were in its possession and would provide additional documents as they were received.

PRINCIPLES OF LAW AND ANALYSIS

"Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."¹

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and issues listed in K.S.A. 2014 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the

¹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.²

This Board concludes the Order on Motion to Compel is not a preliminary hearing order, does not involve a preliminary hearing or any of the jurisdictional issues set forth in K.S.A. 2014 Supp. 44-534a(a)(2). Nor is the Order on Motion to Compel a final order under K.S.A. 2014 Supp. 44-551(l)(1). Rather, it is an interlocutory order made by the ALJ during the litigation of a workers compensation case. It is an order that the ALJ has authority to make during the trial process and the Board lacks jurisdiction to review the order until it is contained in a final order or award.

In the past, the Board or a single Board Member has determined the following are interlocutory orders, over which the Board does not have jurisdiction to consider:

- a denial of respondent's motion to dismiss a claim;³
- an order denying claimant's motion for rebuttal testimony;⁴
- an order for an independent medical evaluation;⁵
- a request to extend terminal dates;⁶
- an order ruling on the objections a party made during evidentiary depositions;⁷
- an order removing the claim from the hearing document and setting aside the terminal dates;⁸

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ *Walker v. State of Kansas*, No.1,048,030, 2013 WL 485696 (Kan. WCAB Jan. 25, 2013).

⁴ *Baker v. Meadowbrook Manor*, Nos. 184,759 & 195,526, 1996 WL 717477 (Kan. WCAB Nov. 8, 1996).

⁵ *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999).

⁶ *Portillo v. Carl Cole Masonry*, No. 220,294, 1999 WL 292840 (Kan. WCAB Apr. 16, 1999).

⁷ *Damron v. State of Kansas*, Nos. 1,028,933, 1,033,846,1,053,691 &1,039,526, 2012 WL 4763646 (Kan. WCAB Sept. 5, 2012).

⁸ *Helms v. Linens N Things*, No. 1,037,177, 2009 WL 298351 (Kan. WCAB Jan. 20, 2009).

- paternity testing;⁹ and
- an order denying claimants' motion to the ALJ and assessing costs of a hearing jointly and severally to claimants.¹⁰

DECISION

WHEREFORE, the Board finds claimant's request for review of the December 22, 2015, Order on Motion to Compel of Administrative Law Judge Rebecca Sanders, is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge

⁹ *Brewer v. 7 Eleven Store*, No. 234,168, 1999 WL 292848 (Kan. WCAB Apr. 5, 1999).

¹⁰ *Steiner v. Norcraft Companies*, No. 256,867, *Sander v. State of Kansas*, No. 258,914 & *Pericola v. Presbyterian Manor*, No. 259,942, 2001 WL 793080 (Kan. WCAB June 27, 2001).